

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)

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KMC Telecom, Inc. ("KMC"), by its undersigned counsel, respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking (released September 6, 1996) in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

KMC is a new provider of competitive access service throughout the nation. With the passage of the Telecommunications Act of 1996,² KMC plans to provide local exchange service in competition with incumbent local exchange carriers ("ILECs"), focusing its initial efforts on smaller markets outside of the 100 largest Metropolitan Statistical Areas ("MSAs"). KMC is both a

¹*In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, FCC 96-367, CC Docket No. 96-187 (rel. Sept. 6, 1996)("Notice" or "NPRM").

²Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act" or "Act").

customer and a competitor of ILECs and therefore may be significantly affected by any rules the Commission adopts to implement Section 402(b)(1)(A) of the 1996 Act.

KMC believes that the competitive goals of the 1996 Act has not yet been realized. The Act created a process of negotiation and ordered access to unbundled elements to achieve the objective of opening local exchange markets to competition. In light of the historical difficulties of opening markets dominated by entrenched ILECs, the Act contains protections for new competitors. The Act directs the FCC to implement specific rules, including tariff rules, to meet the Act's objective. The Commission has made great strides toward establishing the regulatory framework to implement the Act in, among numerous other proceedings, the Interconnection Order.³ Some of the ILECs have challenged the FCC's efforts on appeal.⁴

While KMC realizes that the express terms of Section 402(b)(4) of the 1996 Act direct the Commission to implement streamlined tariff provisions for local exchange carriers by February 8,

³*In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, FCC 96-325, CC Docket No. 96-98, (rel. Aug. 8, 1996)("Interconnection Order").

⁴*SBC Communications, Inc. v. FCC, et al.*, Fifth Circuit, C.A. No. 96-60586 (filed Sept. 6, 1996); *Cincinnati Bell Telephone Co. v. FCC, et al.*, Sixth Circuit, C.A. No. 96-3321 (filed Sept. 6, 1996); *US WEST, Inc. v. FCC, et al.*, D.C. Circuit, C. A. No. 96-1313 (filed Sept. 5, 1996); *New York Telephone Co. and New England Telephone and Telegraph Co. v. FCC, et al.*, D.C. Circuit, C.A. No. 96-1317 (filed Sept. 6, 1996); *Bell Atlantic Corp., BellSouth Corp., and Pacific Telesis Group v. FCC, et al.*, D.C. Circuit, C.A. No. 96-1318 (filed Sept. 6, 1996); *GTE Service Corp., et al. v. FCC, et al.*, D.C. Circuit, C.A. No. 96-1319 (filed Sept. 6, 1996); *Ameritech Corporation v. FCC, et al.*, D.C. Circuit, C.A. No. 96-1322 (filed Sept. 9, 1996); *The Southern New England Telephone Co. v. FCC et al.*, D.C. Circuit, C.A. No. 96-1323 (filed Sept. 10, 1996); *United States Telephone Association v. FCC, et al.*, D.C. Circuit, C.A. No. 96-1352 (filed Sept. 19, 1996); and *Rural Telephone Coalition v. FCC, et al.*, D.C. Circuit, C.A. No. (filed Oct. 1, 1996).

1997, KMC urges the Commission to consider the adverse impact that giving an expansive reading of the Act's terms will have on competition in the local exchange market. KMC believes it is premature to grant sweeping tariff relief to ILECs. KMC also believes that ILECs that enjoy the benefits of price cap or rate of return regulation should not receive the added benefit of streamlined tariff rules. KMC therefore respectfully requests that the Commission narrowly construe Section 204(a)(3) of the Communications Act and implement safeguards for ILEC's streamlined tariff filings. This approach will meet the Act's requirement for reduced tariff regulation while ensuring that tariff reform does not impede the ongoing development of local exchange competition.

I. LEC TARIFFS ELIGIBLE FOR FILING ON A STREAMLINED BASIS (NPRM Part IV, para. 16-18)

Section 402(b)(1)(A)(iii) of the 1996 Act adds a new paragraph 3 to subsection 204(a) of the Communications Act of 1934:

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period as appropriate.

Under the 1996 Act, a LEC is defined as "any person that is engaged in the provision of telephone exchange service or exchange access." Thus, under the express terms of the statute, ILECs are eligible for Section 204(a)(3) streamlined tariff filing.

KMC urges the Commission to strictly limit which types of ILEC tariff filings are eligible for streamlined filing under Section 204(a)(3). The Commission has tentatively concluded that **all**

LEC tariff filings involving changes to the rates, terms and conditions of **existing** service offerings are eligible for streamlined treatment, but new service offerings should be subject to the full panoply of tariff requirements.⁵ KMC supports the Commission's interpretation that only tariff filings regarding existing service offerings should be eligible for streamlined treatment. However, KMC urges the Commission to apply a strict interpretation of Section 204(a)(3) and find that filings involving new or revised rates, terms or conditions of existing service offerings must include a rate increase or decrease to be eligible for the streamlined 7/15 day notice period.

KMC advocates a strict, literal interpretation of Section 204(a)(3) for one major reason: it is premature and inappropriate to provide tariff relief to ILECs before they face effective competition. The 1996 Act imposed two major obligations on ILECs necessary to achieve competition in the local marketplace. First, as a telecommunications carrier, each ILEC has a duty to interconnect with the facilities and equipment of other telecommunications carriers.⁶ Second, as a local exchange carrier, each ILEC has a duty to provide to any requesting telecommunications carrier nondiscriminatory access to unbundled network elements.⁷ These two provisions together form the basis of establishing a framework for competition in the local exchange market.⁸

⁵Notice at para. 18.

⁶47 U.S.C. § 251(a)(1).

⁷47 U.S.C. § 251(c)(3).

⁸"[T]he Committee recognizes that minimum requirements for interconnection are necessary for opening the local exchange market to competition." S. Rep. No. 104-23, at 19 (1995).

Any delay in providing nondiscriminatory interconnection and access to unbundled network elements will allow ILECs to continue to reap the benefits of their long-held monopoly position and engage in special promotions designed to make it more difficult for competitors to attract customers when they finally gain access. The Commission has found that “historically, the ILECs have had strong incentives to resist, and have actively resisted, efforts to open up their networks to users, competitors, or new technology-driven applications of network technology.”⁹ As the Commission is well aware, ILECs are continuing their active resistance and attempting to delay implementation of the essential interconnection and unbundling provisions mandated by the 1996 Act. Numerous ILECs have filed Petitions for Review of the FCC’s Interconnection Order.¹⁰ Those Petitions for Review have been consolidated in the United States Court of Appeals for the Eighth Circuit,¹¹ where GTE and US WEST, Inc. have filed motions to stay the FCC’s Interconnection Order pending judicial review. ILECs are thus refusing to accept the fundamental obligation that they must fulfill in order to implement competition in the local exchange market. Until ILECs willingly accept and implement the specific interconnection and unbundling requirements of the 1996 Act, they will continue to exercise monopoly power. Implementation of sweeping tariff streamlining pursuant to Section 204(a)(3) will only strengthen their entrenched monopoly power and make it even more difficult for competitive providers to enter the local exchange market.

⁹Interconnection Order at para. 241.

¹⁰See note 4, *supra*.

¹¹The Eighth Circuit has designated *Iowa Utilities Board v. FCC et al.*, C.A. No. 96-3321, as the lead case in the consolidated proceeding.

For the foregoing reasons, KMC urges the Commission to follow a prudent, conservative approach and construe Section 204(a)(3) as narrowly as possible. First, 7 day notice periods should be available for LEC tariffs filings that contain only a reduction in rates. Second, 15 day notice periods should be available for LEC tariff filings that contain only an increase in rates. Any other LEC tariff filing that contains new or revised terms, conditions, services or practices should not be eligible for Section 204(a)(3) streamlined filing. These filings should be subject to existing tariff filing rules that provide a meaningful opportunity for interested parties and the Commission to analyze the proposed tariff and respond accordingly.

II. THE COMMISSION SHOULD NOT LIMIT CUSTOMER REMEDIES (NPRM Part III, para. 7-15).

The Notice sets forth two possible interpretations of the phrase “deemed lawful.” Under the first interpretation, a decision not to suspend and investigate a 7/15 day tariff filing would deem the rate included in the filing the “lawful” rate.¹² Under the second interpretation, “deemed lawful” would establish higher burdens for suspensions and investigation by “presuming” LEC tariffs “lawful.”

The Notice asks for comment on whether Congress intended the term “deemed lawful” to limit customers’ remedies.¹³ KMC emphasizes that a presumption that the LEC tariffs are lawful would effectively render the pre-effective tariff petition process worthless. It would be virtually

¹²Notice at para. 8.

¹³Notice at para. 11.

impossible for a small competitor such as KMC to monitor effectively and review ILECs' tariff filings sufficiently to overcome any presumption of lawfulness. KMC would literally have to employ a team of experts to stand by, ready to review an ILEC's tariff filing at a moment's notice, in order to meet the proposed 3-day filing deadline¹⁴ for petitions for suspension or investigation.

If a tariff filing deadline is missed, a competitor's sole option to contest an unlawful tariff will be to file a formal complaint under Section 208. For small competitors that may be harmed by an ILEC's tariff, prosecuting costly Section 208 proceedings may not be a realistic option, or a meaningful remedy. ILECs, on the other hand, have many resources to contest and prolong Section 208 complaint proceedings.

For these reasons, KMC urges the Commission to adopt its second interpretation of the phrase "deemed lawful," subject to the following clarifications. KMC respectfully suggests that in order to balance the relatively large burden this presumption places on ILEC customers and interested parties, the Commission should require ILECs to disclose any aspect of their filing that is not in compliance with the statute, Commission Rules, or Commission Orders and explain why the tariff should be presumed lawful regardless of such noncompliance. Furthermore, customers and competitors challenging the lawfulness of a Section 204(a)(3) filing should be able to rebut the presumption of lawfulness by showing either: (1) *prima facie* noncompliance with any Commission Rule or Order; or (2) the tariff more likely than not will be found unlawful after investigation.

¹⁴Notice at para. 28.

Adopting this interpretation of “deemed lawful” will still meet the Congressional goal of streamlining LEC tariffs yet balance the relative burdens a presumption of lawfulness places on ILECs versus their customers and competitors.

III. STREAMLINED ADMINISTRATION OF LEC TARIFFS

A. The Public and Interested Parties Must be Given Timely Notice of LEC Section 204(a)(3) Filings (NPRM Part V, para. 26 and 28)

The Commission has proposed an extremely short time period of three days after the date of filing for petitions against Section 204(a)(3) tariff filings.¹⁵ Because Section 204(a)(3) radically truncates the pre-effective review period, timely notice to the public and interested parties is paramount. KMC strongly urges the Commission to adopt not only its proposed e-mail notice to interested parties,¹⁶ but also a requirement that ILECs make publicly available a schedule of planned Section 204(a)(3) filings at least thirty days prior to the date of filing. Immediate public access to LEC streamlined tariff filings is essential if customers and competitors are to exercise their rights to petition for suspension or investigation under Section 204(a)(1).

¹⁵Notice at para. 28.

¹⁶Notice at para. 26.

B. The Commission Should Maintain, to the Extent Possible, Its Policy of Relying Primarily on Pre-Effective Review of LEC Tariff Filings (NPRM Part V, para. 23)

KMC urges the Commission to continue to rely primarily on pre-effective review of LEC tariffs.¹⁷ Although KMC understands that the shortened 7/15 day notice periods may place a strain on Commission resources, KMC reiterates its argument that ILECs' market power justifies close Commission scrutiny of their tariff filings. By narrowly construing the application of Section 204(a)(3) as suggested above, and by requiring ILECs to disclose anything in their Section 204(a)(3) filing that is inconsistent with the statute or Commission Rules or Orders, the Commission can limit the burden of maintaining its pre-effective review policy.

C. The Commission Should Reject Section 204(a)(3) Filings that are not Facially in Compliance with the Commission's Rules and Orders (NPRM Part V, para. 25)

Section 61.1(b) of the Commission's Rules provides that

Tariff publications filed with the Commission must conform to the rules in this part. Failure to comply with any provision of this part may be grounds for rejection of the non-complying publication.¹⁸

Given that both the Commission and the public have a very limited time to review Section 204(a)(3) filings, it is imperative that the Commission reject any filing that does not facially comply with the statute or a Commission regulation or order.

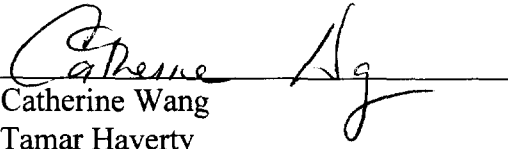
¹⁷Notice at para. 23.

¹⁸47 C.F.R. § 61.1(b).

IV. CONCLUSION

In summary, KMC respectfully submits that until ILECs have met their obligations under the 1996 Act to provide nondiscriminatory interconnection and access to unbundled network elements, the Commission must strictly limit and carefully police ILECs' Section 204(a)(3) streamlined tariff filings. KMC requests that the Commission adopt rules that provide safeguards for customers and small competitors that may be adversely affected by an unlawful ILEC tariff filed under Section 204(a)(3). KMC recommends that those safeguards include: (1) the narrowest possible interpretation of which ILEC tariffs are eligible for streamlined filing; (2) a requirement that ILECs identify, in their Section 204(a)(3) filing, any inconsistency with the statute, Commission Rules, or Commission Orders; (3) a requirement that ILECs provide advance notice of intended Section 204(a)(3) filings and timely electronic notice to interested parties on the same day a Section 204(a)(3) tariff is filed; (4) continued pre-effective review of ILEC tariff filings by the Commission; and (5) a policy of rejecting Section 204(a)(3) filings that do not facially comply with the statute, Commission Rules, and Commission Orders.

Respectfully submitted,


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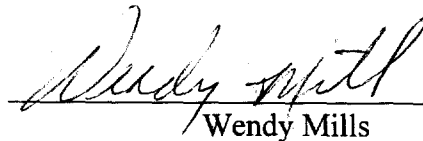
CERTIFICATE OF SERVICE

I, Wendy D. Mills do hereby certify that on this 9th day of October, 1996, the foregoing
Comments of KMC Telecom, Inc., CC Docket No. 96-187 were served Via Messenger to the
following:

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